UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

FELIPE ROMERO-LOPEZ	:	
	:	
vs.	:	CA 03-515-T
	:	
UNITED STATES OF AMERICA	:	

MEMORANDUM AND ORDER

Ernest C. Torres, Chief United States District Judge.

Felipe Romero-Lopez has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. 2255. For reasons stated below, the motion is denied.

Background and Travel

On or about August 19, 2004 Romero was taken into custody by the Immigration and Naturalization Service on a charge of being an illegal alien. In his §2255 motion, Romero alleges that INS took him into custody after he had been arrested during a traffic stop by the Rhode Island State Police, released on bail, and then re-arrested after it was determined that he was an illegal alien.

On August 30, 2001, Romero was arraigned by a Magistrate Judge pursuant to a complaint charging him with re-entry after deportation, in violation of 8 U.S.C. §1326, and Counsel was appointed to represent him. On September 12, 2001, Romero waived indictment and pled guilty to an Information. On March 8, 2002, Romero was sentenced to 77 months, the minimum term of imprisonment under the applicable range established by the

Sentencing Guidelines.

Romero appealed, asserting that his Fourth Amendment rights were violated when he was arrested and detained and that his counsel had been ineffective. The Court of Appeals summarily affirmed the conviction on December 20, 2002. See United States v. Romero-Lopez, Dkt. No. 02-1334, Judgment (1st Cir. December 20, 2002)("Romero Appeal Judgment").

Romero filed his §2255 motion on November 10, 2003. In his motion, Romero claims that: (1) his arrest and detention after the initial traffic stop violated his Fourth Amendment protections against unreasonable searches and seizures, see Petition at ¶12A and pp. 1-8; (2) his re-arrest and further detention after he had been released on bail also violated his Fourth Amendment rights, see id. at ¶ 12B and pp. 8-20; and (3) his trial counsel's failure to raise those Fourth Amendment claims constituted ineffective assistance of counsel. See id. at ¶12 and pp. 20-31. The Government has filed an objection and memorandum in opposition to the original motion to vacate.

On December 8, 2003, Romero filed a "Motion to Amend And Supplement" his §2255 motion seeking to add a claim that his conviction was invalid because the Information failed to allege that he had previously been convicted of an aggravated felony. That motion was denied on the ground that the proposed amendment was futile, because in Almendarez-Torres v. United States, 523

U.S. 224, 118 S.Ct. 1219 (1998), it was held that, under 18 U.S.C. § 1326(b)(2), an earlier conviction is not an element of the offense that must be charged in the information or indictment.

Romero later filed another § 2255 motion claiming that his sentence was unconstitutional in light of Blakely v. Washington, __U.S.__, 124 S. Ct. 2531 (2004), as well as a "Motion for Clarification" which essentially repeats his Blakely claim.

No evidentiary hearing is necessary in order to rule on Romero's motions, because all pertinent facts are established, and the Court is familiar with the case. See Panzardi-Alverez v. United States, 879 F.2d 975, 985 n.8 (1st Cir. 1978)(in postconviction proceeding no hearing is required when district judge is thoroughly familiar with underlying case).

Analysis

The pertinent section of §2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence is in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. §2255, ¶1.

Generally, the grounds justifying relief under §2255 are

limited. A court may grant such relief only if it finds a lack of jurisdiction, constitutional error or a fundamental error of law. See United States v. Addonizio, 442 U.S. 178, 184-185, 99 S.Ct. 2235 (1979) ("[A]n error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice.")(internal quotations omitted).

Moreover, a motion under §2255 is not a substitute for direct appeal. United States v. Frady, 456 U.S. 152, 165 (1982). A movant is procedurally precluded from obtaining §2255 review of claims not raised on direct appeal absent a showing of both "cause" for the default and "actual prejudice" – or, alternatively, that he is "actually innocent" of the offense for which he was convicted. Bousley v. United States, 523 U.S. 614, 622 (1998)(citations omitted). See Brache v. United States, 165 F.3d 99, 102 (1st Cir. 1999). However, claims of ineffective assistance of counsel are not subject to this procedural hurdle. See Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994).

Here, for reasons stated below, none of the claims raised by Petitioner entitles him to relief, as discussed below.

I. Fourth Amendment Claims

Romero claims that his arrest, re-arrest and detention violated the Fourth Amendment's prohibition against unreasonable seizures; and that, therefore, the information that he had

previously been deported and found in the United States is inadmissible as "fruit of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

That claim lacks merit for at least two reasons. First, these claims were made and rejected on direct appeal. See Romero Appeal Judgment at 1. It is well established that claims raised and decided on direct appeal from a criminal conviction may not be re-asserted in a §2255 proceeding. See Singleton v. United States, 26 F.3d 233, 240 (1st Cir. 1994)(issues disposed of in any prior appeal will not be reviewed again by way of a 28 U.S.C. §2255 motion), quoting Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967); Argencourt v. United States, 78 F.3d 14, 16 n.1 (1st Cir. 1996)(same).

Second, as the Court of Appeals noted, these claims were waived by Petitioner's guilty plea. See Romero Appeal Judgment at 1, citing United States v. Valdez-Santana, 279 F.2d 143, 145 (1st Cir. 2002) (guilty plea waived right to appeal Fourth Amendment issues). See also United States v. Cordero, 42 F.3d 697, 698-699 (1st Cir.1994)("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."), quoting Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602

(1973).

Even if Romero could claim Fourth Amendment violations and even if those claims had merit, the information regarding his previous deportation, would not have been excludible as "fruit of the poisonous tree." That information was not the product of Romero's detention. Furthermore, "The identity of an alien or . . . a defendant, is 'never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.'" Navarro-Chalan v. Ashcroft, 359 F.3d 19, 22 (1st Cir. 2004), quoting Immigration and Naturalization Services v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

II. Ineffective Assistance of Counsel

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), a defendant who claims that he was deprived of his Sixth Amendment right to effective assistance of counsel must demonstrate:

1. That his counsel's performance "fell below an objective standard of reasonableness;" and
2. "[A] reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland, 466 U.S. at 687-88, 694 (1984). See Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002).

The defendant bears the burden of identifying the specific acts or omissions constituting the allegedly deficient

performance. Conclusory allegations or factual assertions that are fanciful, unsupported or contradicted by the record will not suffice. Dure v. United States, 127 F. Supp. 2d 276, 279 (D.R.I. 2001)(citing Lema v. United States, 987 F.2d 48, 51-52 (1st Cir. 1993)).

In assessing the adequacy of counsel's performance:

> [T]he Court looks to "prevailing professional norms." A flawless performance is not required. All that is required is a level of performance that falls within generally accepted boundaries of competence and provides reasonable assistance under the circumstances.

Ramirez v. United States, 17 F. Supp. 2d 63, 66 (D.R.I. 1998), quoting Scarpa v. Dubois, 38 F. 3d 1, 8 (1st Cir. 1994) and citing Strickland, 466 U.S. at 688.

In this case, the relevant inquiry regarding the first prong of the Strickland test is "whether the Fourth Amendment objection was so obvious and promising that no competent lawyer could have failed to pursue it." United States v. Arroyo, 195 F.3d 54, 55 (1st Cir. 1999), citing Kimmelman v. Morrison, 477 U.S. at 381-82, 106 S.Ct. 2574.

Since Romero failed to explain why his arrest and detention violated the Fourth Amendment, it is difficult to see how a challenge would have succeeded or how his counsel can be faulted for failing to raise it. See e.g. Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999)("[C]ounsel's performance was not deficient if he declined to pursue a futile tactic."), citing United States v.

Wright, 573 F.2d 681, 684 (1st Cir. 1978).

Nor has Romero made any showing that the result would have been any different even if he was improperly arrested or detained. As already noted, information about Romero's immigration status would not have been excluded in any event. Thus, Romero has filed to make the required showing of prejudice. See Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Arroyo, 195 F.3d at 55 (even if incompetence is shown, it would still be necessary to show prejudice). See also Holman v. Page, 95 F.3d 481, at 490 (7th Cir. 1996)(no prejudice under Strickland from admission at trial of evidence seized in violation of Fourth Amendment).

III. Blakely Claims

Romero contends that, under the Supreme Court's intervening decision in Blakely v. Washington, – U.S. –, 124 S. Ct. 2531 (2004), he had a constitutional right to have a jury, rather than a judge, determine whether his Guidelines offense level should have been increased by 16 levels because he, previously, had been convicted of an aggravated felony. That claim lacks merit because, as both Blakely and the Supreme Court's subsequent decision in Booker, – U.S. –, 125 S.Ct. 738, make clear, the requirement that factual findings that require an increase in a defendant's Guidelines sentence must be either admitted or found by a jury beyond a reasonable doubt does not apply to the fact of prior convictions. As the Blakely Court stated: "Other than the

fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348 (2000)(emphasis added); United States v. Fraser, 388 F.3d 371, 377 (1st Cir. 2004)(even under Blakely the fact of a prior conviction need not be proved to a jury beyond a reasonable doubt).

Moreover, neither the Booker decision nor the Blakely decision applies retroactively to Romero's conviction and sentence. See, as to Booker, McReynolds v. United States, 397 F.3d 479, 480 (2d Cir. 2005)(holding that Booker does not apply retroactively to collateral proceedings under § 2255); In re Anderson, 396 F.3d 1336, 1339-1340 (11th Cir. 2005)(same); Tuttamore v. United States, 2005 WL 234368 (N.D. Ohio Feb. 1, 2005)(same, citing cases). As to Blakely, see Carmona v. United States, 390 F.3d 200, 202 (2d Cir. 2004) (noting that "the Supreme Court has not made the Blakely rule applicable to cases on collateral review"); Simpson v. United States, 376 F.3d 679, 681-682 (7th Cir. 2004)(same); In re: Dean, 375 F.3d 1287, 1290 (11th Cir. 2004)(Blakely rule does not apply retroactively on collateral review and cannot authorize a successive habeas petition). See also Schriro v. Summerlin, __ U.S.__, 124 S.Ct. 2519 (2004) (declaring that Ring v. Arizona, 536 U.S. 584, 122

S.Ct. 2428 (2002), does not apply retroactively on habeas review); cf. Sepulveda v. United States, 330 F.3d 55, 66-67 (1st Cir. 2003)(holding that Apprendi does not apply retroactively to cases on habeas review).

Conclusion

For all the foregoing reasons, all of Romero's motions are denied and dismissed.

IT IS SO ORDERED:

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Ernest C. Torres
Chief U.S. District Judge
March , 2005